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No. 82-1579

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HAYFIELD NORTHERN RAILROAD COMPANY, INC.
Appellant,

and

STATE OF MINNESOTA,
Appellant/Intervenor,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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APPEAL DOCKETED MARCH 25, 1983
PROBABLE JURISDICTION NOTED OCTOBER 3, 1983

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JOINT APPENDIX

STATE OF MINNESOTA
County of Dodge

DISTRICT COURT
Third Judicial District

HAYFIELD NORTHERN RAILROAD COMPANY,
A Minnesota Corporation,

Plaintiff,

vs.

CHICAGO, NORTHWESTERN AND
PACIFIC RAILROAD COMPANY,

Defendant.

SUMMONS

THE STATE OF MINNESOTA TO
THE ABOVE NAMED DEFENDANT:

You are hereby summoned and required to serve upon Plaintiff's attorney an Answer to the Complaint which is herewith served upon you within twenty (20) days after service of the Summons upon you, exclusive of the day of service. If you fail to do so, Judgment by Default will be taken against you for the relief demanded in the Complaint.

Dated this 31st day of March, 1982.

WARD, GRAY & OEHLER,
LTD.
By: ROBERT S. ABDALIAN
Attorneys for Plaintiff
103 Omni Building
1652 Greenview Drive S.W.
P.O. Box 6390
Rochester, MN 55903
(507) 288-5567

STATE OF MINNESOTA
County of Dodge

DISTRICT COURT
Third Judicial District

HAYFIELD NORTHERN RAILROAD COMPANY,
A Minnesota Corporation,

Plaintiff,

vs.

CHICAGO, NORTHWESTERN AND
PACIFIC RAILROAD COMPANY,

Defendant.

COMPLAINT

1. Plaintiff Hayfield Northern Railroad Company is a Minnesota Corporation.

2. Defendant Chicago, Northwestern and Pacific Railroad Company is a foreign Corporation.

3. Plaintiff desires to exercise its power of eminent domain pursuant to Minnesota Statute §222.27 and Minnesota Statute §300.04; to wit: Purchase the railroad track and appurtenances and right-of-way of Defendant in Dodge and Mower County, Minnesota from Sargeant and Waltham, Minnesota through Hayfield, Minnesota to Dodge Center, Minnesota.

4. On information and belief Plaintiff believes that Defendant is about to rip out its track in Dodge County, Minnesota or sell its track and appurtenances thereby frustrating and defeating Plaintiff in its attempt to exercise its power of eminent domain.

WHEREFORE, Plaintiff prays:

1. That the Court conduct an expedited hearing or hearings relative to the issues presented in this Complaint as soon as practicable.

2. That, upon such expedited hearings, the Court issue a temporary and permanent injunction as requested in said Complaint.

3. For such other relief as justice and equity may require.

Dated: March 31, 1982.

WARD, GRAY & OEHLER,
LTD.
By: ROBERT S. ABDALIAN
Attorney for Plaintiffs
103 Omni Building
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STATE OF MINNESOTA
County of Dodge

DISTRICT COURT
Third Judicial District

HAYFIELD NORTHERN RAILROAD COMPANY,
A Minnesota Corporation,

Plaintiff,

vs.

CHICAGO, NORTHWESTERN AND PACIFIC RAILROAD COMPANY,

Defendant.

TEMPORARY RESTRAINING ORDER WITHOUT NOTICE AND ORDER TO SHOW CAUSE WHY PRELIMINARY INJUNCTION SHOULD NOT ISSUE, MRCP 65

Upon the Complaint filed herewith, Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction,

the Affidavit of Stephen L. Becvar, sworn to on March 31, 1982, in support of such Motion, and the Memorandum of Law in support thereof, and it appearing therefrom that Defendant unless restrained will forthwith sell, encumber, or remove, railroad track and appurtenances located in Dodge County and Mower County Minnesota and that immediate and irreparable injury will be done to Plaintiff in such that acts would alter the status quo existing between Plaintiff and Defendant before a hearing on the merits could be held, and that notice of the application for this order was not given to Defendants to prevent them from accomplishing what is sought to be enjoined before this order could be obtained, therefore, IT IS HEREBY ORDERED that Defendant, its agents, successors, assignees, principals, assignors and persons acting in concert with them are temporarily enjoined pursuant to Rule 65 of the Minnesota Rules of Civil Procedure from encumbering, removing, disposing, or otherwise affecting property owned by Defendant in Dodge and Mower County, Minnesota to wit: approximately 22.0 miles of railroad track and appurtenances running from Sargeant and Waltham through Hayfield, Minnesota to Dodge Center, Minnesota.

IT IS FURTHER ORDERED that Defendants appear and show cause at the hearing to be held at Mantorville, Minnesota, on May 13, 1982 at 2 o'clock p.m., or as soon thereafter as counsel may be heard, why an order should not be made enjoining, during the pendency of this action, Defendant, their agents, successors, assignees, principal, assignors, and persons acting in concert with them from encumbering or removing said property in Dodge and Mower County, Minnesota to any person other than Plaintiff.

IT IS FURTHER ORDERED that Plaintiffs be required to post bond in the penal sum of $2,000.00.

IT IS FURTHER ORDERED that service shall be made on Defendant post haste.

Done this 31st day of March, 1982.

O. RUSSELL OLSON
Judge of District Court
Third Judicial District
Minnesota

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIRST DIVISION

Civil File No. ———

HAYFIELD NORTHERN RAILROAD COMPANY,
A Minnesota Corporation,

Plaintiff,

vs.

CHICAGO, NORTHWESTERN AND
PACIFIC RAILROAD COMPANY,

Defendant.

NOTICE OF FILING
PETITION FOR REMOVAL

TO: The above-named PLAINTIFF and its attorneys, ROBERT S. ABDALIAN, 103 Omni Building, 1652 Greenview Drive S.W., P.O. Box 6390, Rochester, MN 55903 and PAUL A. SKJERVOLD, Suite 1800, Dain Tower, Minneapolis, MN 55402.

You, and each of you, are hereby notified that on April 5, 1982, a Verified Petition for Removal of the above-entitled

action from the District Court of the State of Minnesota, Third Judicial District, County of Dodge, to the United States District Court for the District of Minnesota, First Division, St. Paul, Minnesota, together with a Bond for Removal (copies of which Petition and Bond are attached hereto), were duly filed in the United States District Court for the District of Minnesota, First Division, St. Paul, Minnesota.

DATED: April 5, 1982.

LINDQUIST & VENNUM
By: THOMAS E. GLENNON
Attorneys for Defendant
4200 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
(612) 371-3211

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIRST DIVISION

Civil File No. ———

HAYFIELD NORTHERN RAILROAD COMPANY,
A Minnesota Corporation,

Plaintiff,

vs.

CHICAGO, NORTHWESTERN AND
PACIFIC RAILROAD COMPANY,

Defendant.

VERIFIED PETITION FOR REMOVAL
OF CIVIL ACTION PURSUANT TO
28 U.S.C. §1441

TO: The Judges of the United States District Courts for the District of Minnesota.

Defendant, Chicago, Northwestern and Pacific Railroad Company, correctly identified as Chicago and North Western Transportation Company, a Delaware corporation, files this petition to remove the foregoing cause from the District Court of the State of Minnesota, Third Judicial District, County of Dodge, to the United States District Court for the District of Minnesota, First Division, St. Paul, Minnesota, and respectfully shows:

1. That service of the Summons and Complaint was purportedly made upon defendant Chicago and North Western Transportation Company on April 2, 1982; that a true and correct copy of the Summons and Complaint is attached hereto as Exhibit 1.

2. That said Summons and Complaint are the initial pleadings setting forth the claims upon which the attempted state court action is based, and which together with Motion for Temporary Restraining Order Without Notice, MRCP 65.01, Temporary Restraining Order Without Notice and Order to Show Cause Why Preliminary Injunction Should Not Issue, MRCP 65 signed by Honorable O. Russell Olson, Affidavit of Stephen L. Becvar, Affidavit of Robert S. Abdalian, Notice of Motion for Preliminary Injunction, Motion for Preliminary Injunction, Memorandum of Law in Support of Motion for Temporary Injunction, and Plaintiff's Bond for TRO and Preliminary Injunction, constitute all of the process, pleadings and orders served upon defendant by plaintiff in the state court action. True and correct copies of the afore-described

process, pleadings and orders are attached hereto as Exhibits 2 through 9. No further proceedings have been held in the Dodge County District Court other than the Court's hearing of plaintiff's motion for temporary restraining order, said hearing resulting in the issuance of said Court's Temporary Restraining Order Without Notice and Order to Show Cause Why Preliminary Injunction Should Not Issue, MRCP 65, a true and correct copy of which is attached hereto as Exhibit 3.

3. That at the time of the commencement of this action, defendant Chicago and North Western Transportation Company was and is a Delaware corporation with its offices and principal place of business in Chicago, Illinois; that defendant Chicago and North Western Transportation Company is not a citizen of the State of Minnesota; and that the amount in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs.

4. That upon information and belief, plaintiff Hayfield Northern Railroad Company is a corporation organized and existing under the laws of the State of Minnesota, with its offices and principal place of business in Dodge County, Minnesota, and is a citizen of the State of Minnesota.

5. That the action is a civil action of which this court has original diversity jurisdiction under 28 U.S.C. §1332, and is one which defendant is entitled to remove to this court pursuant to 28 U.S.C. §1441.

6. That the action necessarily involves a civil action arising under the laws of the United States and principles of federal statutory preemption of which this Court has original jurisdiction under 28 U.S.C. §1331, and is one in which defendant is entitled to remove to this Court pursuant to 28 U.S.C. §1441.

7. Defendant Chicago and North Western Transportation Company files herewith a bond with good and sufficient surety

conditioned that defendant Chicago and North Western Transportation Company pay all costs and disbursements incurred by reason of this removal proceeding should it be determined that the action was not removable or was improperly removed.

WHEREFORE, Defendant Chicago and North Western Transportation Company prays that the above action now pending in the District Court, County of Dodge, State of Minnesota, be removed from that court to this United States District Court.

Dated this 5th day of April, 1982.

LINDQUIST & VENNUM
By THOMAS E. GLENNON
Attorneys for Defendant
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80 South Eighth Street
Minneapolis, Minnesota 55402
(612) 371-3211

STATE OF MINNESOTA
COUNTY OF HENNEPIN—ss.

Thomas E. Glennon, being first duly sworn on oath deposes and states that he is the attorney for the defendant Chicago and North Western Transportation Company, herein; that he has read the foregoing Petition for Removal pursuant to 28 U.S.C. §1441 and knows that contents thereof and that the same are true of his own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

THOMAS E. GLENNON

(Jurat omitted in printing)

(Affidavit of service omitted in printing)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIRST DIVISION

Civil File No. 3-82-376

HAYFIELD NORTHERN RAILROAD COMPANY,
A Minnesota Corporation,

Plaintiff,

v.

CHICAGO, NORTHWESTERN AND PACIFIC RAILROAD COMPANY,

Defendant.

ANSWER OF CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

Defendant Chicago and North Western Transportation Company ("C&NW"), incorrectly identified as Chicago, Northwestern and Pacific Railroad Company, for its Answer to plaintiff's Complaint, states and alleges as follows:

FIRST DEFENSE

1. C&NW denies each and every allegation, statement, matter and thing contained in plaintiff's Complaint except as hereinafter specifically admitted, qualified and alleged.

2. C&NW is without information sufficient to form a belief as to the truth or accuracy of the allegations contained in Paragraph 1 of plaintiff's Complaint, and therefore denies the same.

3. With respect to the allegations contained in Paragraph 2 of plaintiff's Complaint, C&NW states and alleges that it is a foreign business corporation organized and existing under the laws of the State of Delaware, and is authorized to do

business and is doing business in the State of Minnesota as a railroad corporation which owns and operates an interstate railroad system.

4. With respect to the allegations contained in Paragraph 3 of plaintiff's Complaint, C&NW states and alleges that the principals and incorporators of the plaintiff had invoked the Interstate Commerce Commission's exclusive plenary jurisdiction pertaining to continued rail service, which said jurisdiction resulted in an unappealed order determining fair market value for purposes of acquisition or subsidy of the segment of railroad line in question. The principals and incorporators of plaintiff chose not to exercise the rights pursuant to federal law and did not appeal the Interstate Commerce Commission's determination of fair market value for purposes of acquisition or subsidy required, 49 U.S.C. §10905 (f)(1) and (2), but rather, appealed the substantive issue of abandonment.

5. With respect to the allegations contained in Paragraph 4 of plaintiff's Complaint, C&NW states and alleges that C&NW is prepared to exercise rights and obligations accorded it by the Interstate Commerce Act and proceedings undertaken before the Interstate Commerce Commission, pursuant to the provisions and procedures of the Interstate Commerce Act and regulations promulgated thereunder.

SECOND DEFENSE

6. Plaintiff's Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

7. Plaintiff's purported claim for relief is precluded pursuant to the terms and effect of the Interstate Commerce Act, which by its terms and effect preempts plaintiff's purported state court action, pursuant to the supremacy clause of U. S. Const., Art. VI, cl. 2.

FOURTH DEFENSE

8. Plaintiff's purported cause of action constitutes an impermissible collateral attack on the regulatory processes, powers and orders of the Interstate Commerce Commission, and as such, plaintiff's purported cause of action is barred by operation of the plenary and preemptive powers and procedures of the Interstate Commerce Act and regulations promulgated thereunder.

FIFTH DEFENSE

9. To the extent of any conflict between the terms and effect of the Interstate Commerce Act and Minn. Stat. §§222.27 and 300.04, said Minnesota statutes constitute an impermissible burden on interstate commerce and an impermissible obstruction of the rights and responsibilities accorded C&NW by the processes, powers and orders of the Interstate Commerce Commission and proceedings undertaken before the Interstate Commerce Commission pursuant to the Interstate Commerce Act.

SIXTH DEFENSE

10. Plaintiff's purported claim for relief is barred by operation of the doctrines of estoppel, laches and waiver.

WHEREFORE, defendant Chicago and North Western Transportation Company prays that this Court dismiss plaintiff's pretended cause of action against defendant Chicago and North Western Transportation Company, and award defendant Chicago and North Western Transportation Company its reasonable attorneys' fees, costs and disbursements herein, together with such other and further relief as this Court deems just and appropriate.

DATED: April 16, 1982.

LINDQUIST & VENNUM
By Thomas E. Glennon and
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Chicago and North Western
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OF COUNSEL:
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(Affidavit of service omitted in printing)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIRST DIVISION

File No. 3-82-376

HAYFIELD NORTHERN RAILROAD COMPANY,
a Minnesota corporation,

Plaintiff,

v.

CHICAGO, NORTHWESTERN AND PACIFIC
RAILROAD COMPANY,

Defendant.

NOTICE OF MOTION AND MOTION TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, TO DISSOLVE THE TEMPORARY RESTRAINING ORDER

TO: Plaintiff and its Attorneys, Robert S. Abdalian, Esq. and Ward, Gray & Oehler, Ltd., 103 Omni Building, 1652 Greenview Drive S.W., P.O. Box 6390, Rochester, Minnesota 55903, and Paul A. Skjervold, Esq., Suite 1800, Dain Tower, Minneapolis, Minnesota 55402.

PLEASE TAKE NOTICE that defendant Chicago and North Western Transportation Company will move the Court on the 14th day of May, 1982, at 3:00 p.m., or as soon thereafter as counsel can be heard, in Courtroom 3, Federal Courts Building, St. Paul, Minnesota, before Judge Paul A. Magnuson, for an Order dismissing the Complaint or, in the alternative, dissolving the temporary restraining order herein dated April 2, 1982.

The grounds for said Motion are as follows:

1. Pursuant to Rule 12(b)(1), Fed. R. Civ. P., the Court lacks jurisdiction over the subject matter of plaintiff's Complaint.

2. Pursuant to Rule 12(b)(6), Fed. R. Civ. P., plaintiff's Complaint fails to state a claim upon which relief can be granted.

3. Pursuant to Rule 65, Fed. R. Civ. P., the Court should dissolve the temporary restraining order herein dated April 2, 1982, signed by Honorable O. Russell Olson, as contrary to law.

This Motion will be made upon the attached Memorandum of Law in Support of Chicago and North Western Transportation Company's Motion to Dismiss the Complaint or, in the Alternative, to Dissolve the Temporary Restraining Order, and upon all the files, records, and proceedings herein.

DATED: April 30, 1982.

LINDQUIST & VENNUM
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Chicago and North Western
Transportation Company

OF COUNSEL:
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Chicago and North Western
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One North Western Center
165 North Canal Street
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(312) 559-6072

(Affidavit of service omitted in printing)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil File No. 3-82-376

HAYFIELD NORTHERN RAILROAD COMPANY,
a Minnesota corporation,

Plaintiff,

v.

CHICAGO, NORTHWESTERN AND PACIFIC
RAILROAD COMPANY,

Defendant.

ORDER

This matter is before the Court on the motion of the State of Minnesota to intervene. Gilbert S. Buffington, Special Assistant Attorney General, appeared for the State; Paul A. Skjervold, Esq. and Robert S. Abdalian, Esq., appeared for the plaintiff. Thomas E. Glennon, Esq. and Ann Keating, Esq., appeared for the defendant. Based upon the motion of the State, the State's supporting memorandum, the submissions of counsel and the files and proceedings herein,

IT IS ORDERED that the State of Minnesota may intervene in this matter with all the rights of a party.

Dated: June 8, 1982.

PAUL A. MAGNUSON
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIRST DIVISION

File No. 3-82-376

HAYFIELD NORTHERN RAILROAD COMPANY,
a Minnesota corporation,

Plaintiff,

v.

CHICAGO, NORTHWESTERN AND PACIFIC RAILROAD COMPANY,

Defendant.

NOTICE OF APPEAL

Notice is hereby given that Hayfield Northern Railroad Company, plaintiff above named, hereby appeals to the United

States Court of Appeals for the Eighth Circuit from the final judgment entered in this action on the 22 day of July, 1982.
Dated: 23 July 1982

WARD, GRAY & OEHLER, LTD.
By: Robert S. Abdalian
Attorney for Hayfield Northern
Railroad Company
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WARREN SPANNAUS
Attorney General
Attorney for Defendant
Intervenor
By: Gilbert S. Buffington
Special Assistant
Attorney General

(Affidavit of service omitted in printing)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term, 1981
No. 82-1880

HAYFIELD NORTHERN RAILROAD,
Appellant,

vs.

CHICAGO NORTHWESTERN TRANSPORTATION COMPANY,
Appellee.

Appeal from the United States District Court for the District of Minnesota

---

Before: HEANEY, BRIGHT, ARNOLD, Circuit Judges

ORDER

The motion to expedite the appeal is granted. The Clerk is directed to set this case for oral argument on the appeal at the September session in St. Paul, Minnesota. The Clerk will set an expedited briefing schedule.

The stay pending appeal will continue in effect; provided, however, that appellant must post a bond in the amount of $100,000.00 on or before Monday, August 2, 1982 in form and content satisfactory to the Clerk of this Court. The bond shall be secured by a corporate surety, cash, government securities, or other good and sufficient security, and shall be conditioned so as to protect appellee from any loss or damages it may sustain if the judgment of the District Court is affirmed.

July 28, 1982

INTERSTATE COMMERCE COMMISSION

DECISION

No. AB-1 (Sub-No. 113)F

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY—ABANDONMENT BETWEEN OELWEIN, IA AND RANDOLPH, MN

Decided: July 10, 1981

* * *

CNW's engineering witness, Reid, also calculated the avoidable costs of maintaining ways and structures on the Line as

shown in Appendix B, including estimated costs for the subsidy year to maintain tracks, bridges and other facilities to comply with Federal Railroad Administration track safety standards for Class I track, as set forth in line 5(a) in the final column. The latter amount, $741,585 or $5,079 per mile, contrasts sharply with applicant's system average cost for maintenance of ways and structures, $15,231 per mile annually in 1978-79, and with the average annual expenditure on the Line during those years as developed from CNW payroll and material charge-out records, $2,969 per mile. In the latter regard, some of the costs projected for the subsidy year are well above corresponding actual expenditures on the Line. For example, the costs projected for ties, running, $159,280, contrasts with $2,148 expended in 1979 and $625 during the base year, and the projection for rail, running, is $4,935, as compared with $252 in 1979 and $1,112 in the base year. An even sharper contrast is provided by ballast, running, $509 during the base year projected at $19,185, and roadway machines, projected at $75,174 as compared with zero expenditure during the base year. Applicant defines the projected annual maintenance cost, $741,585, as the average annual cost of maintaining the Line in Class I condition over an extended period of time, a 40 to 50 year period. Applicant acknowledges that maintenance expenditures presently and in recent years have been far below projected costs, and reflect CNW's policy of maintaining its lines in a safe condition while keeping its operating losses at a minimum on marginal lines. Under this policy the Line "was allowed to deteriorate from Class II or better to basically FRA Class I (10 m.p.h.)."

* * *

Applicant insists that in operating the Line it has incurred avoidable losses in the amounts previously described, and that,

taking into consideration opportunity costs, its total avoidable losses on the Line were $1,568,506 in 1978, $1,542,880 in 1979, and $854,758 during the first 7 months of 1980, calculated as set forth in Appendix B. In the latter regard, applicant states that it has calculated opportunity costs using methodology approved by the Commission, and it points out that the Commission has recognized that opportunity costs are real economic costs experienced by railroads when they forego more profitable use of their resources, and that such costs can be a significant factor in determining whether a particular line at issue is imposing a burden on interstate commerce. Applicant also points out that maintenance on the Line has been minimal, consistent with safety of operations, in an effort to economize and to allocate its limited funds to more productive lines. Applicant notes that just to maintain the Line in the future at minimal Class I FRA standards will entail annual expenditures of $741,585, and it contends that it would be an improvident use of funds to make such expenditures on a line that cannot pay its own operating costs. As seen, applicant's calculations totally exclude consideration of overhead traffic, consistent with its corporate decision that overhead traffic will no longer be routed over the Line. The routing of overhead traffic, applicant insists, is completely a matter of managerial discretion, and applicant contends that the Commission has long recognized that it is the carrier's prerogative to use its facilities in the most efficient and least costly manner consistent with its public obligations. In today's world of spiraling material, fuel and labor costs, according to applicant, the ability of management to rationalize the CNW system has been a key to the survival of CNW.

* * *

Considering first the burden imposed on the railroad and on commerce by continued operation of the Line, the evidence is convincing that during 1978, 1979, and the first 7 months of 1980, at least, operations on the Line have been far from a financial drain on applicant or a burden on commerce. To the contrary, the Line yielded substantial net revenues. As computed by applicant, overhead revenues on the Line in 1978 exceeded line-haul expenses (based on replacement costs) by more than $2.5 million and by more than $2.8 million if historical costs are used, and applicant concedes that net overhead revenues would be "somewhere in between" those two figures. Applying the average of those net overhead revenues to applicant's cost and revenue data as shown in Appendix B, applicant's avoidable loss from operations in 1978, $326,850, was actually a net revenue of more than $2.4 million. Similarly, in 1979 and the first 7 months of 1980, applicant had net revenues, on this basis, of more than $3 million and $2.1 million, respectively. Making allowance for opportunity costs as computed by applicant does not alter the fact that operations on the Line during these periods yielded net revenues. In the latter regard, opportunity cost has been defined as the economic loss experienced by a carrier when it foregoes some other, more profitable use of its resources, such as a branch line, i.e., an investment, such as is

represented by a branch line, which brings a return to a carrier that is less than the cost of capital represents an opportunity cost. *Texas and Pacific Railway Company Abandonment*, 363 I.C.C. 666 (1980). The Commission in recent years has considered opportunity cost as a factor, one of many, in fact, in its determinations of whether public convenience and necessity permit the abandonment of rail lines in particular cases. See

Texas and Pacific, supra, and the decision of the Seventh Circuit in *Farmland Industries, Inc. v. United States and Interstate Commerce Commission* (No. 80,1308, decided March 3, 1981). In this proceeding, as in others, opportunity costs must be weighed in the balance to determine whether there is undue burden on the carrier and on commerce.

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* * *

Base year operations as depicted in Appendix F show positive results, that is, a net revenue return based on actual, historical data. It is the essence of applicant's case, however, that the great volume of overhead revenues reflected in this data must be ignored because applicant, as a matter of managerial discretion, has determined that overhead traffic will no longer move on this Line. There is ample precedent for the proposition advanced by applicant that the routing of overhead traffic and the selection of alternate routes for the handling of such traffic is a matter of managerial discretion. See *Baltimore & Ohio R. Co. Abandonment*, 354 I.C.C. 240 (1978) and *Southern Pacific Transp. Co.—Abandonment*, 360 I.C.C. 138 (1979). Protestants' basic argument in *Baltimore & Ohio, supra*, as here, was that applicant had failed to prove that the line proposed to be abandoned was operating at a loss. The evidence there showed that operating losses would have been incurred if overhead movements were not considered. In approving the abandonment, the Commission noted that it has long recognized that, while revenues derived from overhead traffic are a factor in determining a line's earning capacity, in the final analysis it is the revenues produced by traffic originating and terminating on a line, and the expenses incident to such traffic, that is the principal criteria in determining whether there exists a real need for the continued operation of the line. The Commission

stressed that carriers should be free to use their facilities in such a manner as they deem necessary for the promotion of economy and efficiency, and that local shippers who are unable to support a railroad line cannot demand continued rail transportation simply because the line is used for the movement of overhead traffic, traffic which could be handled as expeditiously over other routes. More recently, in No. AB-7 (Sub-No. 76), *Chicago, Milwaukee St. P. & P. R. Co., Abandonment*, decided December 3, 1979 (not printed), division 2 of the Commission stated that so long as shippers can route overhead traffic over similar routes, the contribution of overhead traffic moving over a line proposed to be abandoned will not be considered. In the instant proceeding, as seen, applicant has shown that it has various, adequate alternatives for routing its overhead traffic now or formerly moving on this Line, and that a management decision has been made to divert from the Line all remaining overhead traffic. Applicant's officials freely acknowledged that this decision was made in contemplation of this abandonment, pointing out that the shifting of overhead traffic away from the Line is a step in the overall rationalization of its entire system for reasons of economy and efficiency. Thus, while on its face, applicant has by corporate decree rendered a profitable line unprofitable, the move is, in a larger sense, in accord with overwhelming Commission precedent.

* * *

DOCKET NUMBER AB-1 (SUB. NO. 113F)

APPENDIX C

OELWEIN, IOWA TO RANDOLPH, MINNESOTA
INCLUDING HAYFIELD TO WALTHAM, MINNESOTA

ESTIMATED LIQUIDATION VALUE

Main Track	144.8 Miles
Other Track	24.8 Miles
Total All Tracks	169.6 Miles

Land

2,107.48 Acres which possibly can be sold to various persons at an estimated total value of $1,742,000						$(1,742,000)

Bridges, Trestles and Culverts

Bridge timber, usable	53.322	MBM	@	$ 365.00	$(19,463)	
Bridge steel, usable	264.2	NT	@	632.20	(167,027)	
Bridge steel, scrap	219.0	NT	@	77.82	(17,043)	
						(203,533)

Ties

Cross ties, usable	222,100	Ea.	@	5.04	(1,119,384)	
Switch ties, usable	143.604	MBM	@	224.38	(32,222)	
						(1,151,606)

Rail

115# Usable	14,887.172	NT	@	312.90	(4,658,196)	
112# Usable	944.029	NT	@	312.90	(295,387)	
100# Usable	480.983	NT	@	312.90	(150,500)	
90# Usable	10,246.020	NT	@	312.90	(3,205,980)	
112# Scrap	9.539	NT	@	79.64	(760)	
100# Scrap	9.817	NT	@	79.64	(782)	
90# Scrap	1,138.455	NT	@	79.64	(90,667)	
85# Scrap	1,331.256	NT	@	79.64	(106,021)	
75# Scrap	838.312	NT	@	79.64	(66,763)	
60# Scrap	82.780	NT	@	79.64	(6,593)	
						(8,581,649)

Other Track Material

Crossing Diamonds, usable		2	Ea.	@ 15,000.00	(30,000)	
Turnouts complete, usable	#12-115#	1	TO	@ 9,216.37	(9,216)	

DOCKET NUMBER AB-1 (SUB. NO. 113F)

Appendix C

OELWEIN, IOWA TO RANDOLPH, MINNESOTA
INCLUDING HAYFIELD TO WALTHAM, MINNESOTA

ESTIMATED LIQUIDATION VALUE—Continued

Other Track Material (continued)						
	#12-90#	1	TO	@ 6,956.69	(6,957)	
	#10-115#	13	TO	@ 7,817.74	(101,631)	
	#10-90#	3	TO	@ 5,899.75	(17,699)	
	#9-90#	1	TO	@ 4,963.53	(4,964)	
	#8-90#	10	TO	@ 4,001.86	(40,019)	
	#8-85#	1	TO	@ 3,797.20	(3,797)	
Switches, frogs, guard rails switch lamps and switch stands						
Scrap	151.660	NT		@ $ 64.18	$(9,734)	
Tie plates (Gross less 10% estimated loss)						
Usable	125,905.18	Cwt.		@ 18.82	(2,369,535)	
Scrap	368.991	NT		@ 91.67	(33,825)	
Joint bars (Gross less 10% estimated loss)						
Usable	19,000.75	Cwt.		@ 26.25	(498,770)	
Scrap	627.519	NT		@ 91.67	(57,525)	
Bolts, nutlocks & spikes, etc. (Gross less 25% estimated loss)						
Scrap	1,129.216	NT		@ 91.67	(103,515)	
						$(3,287,187)
Signals						(115,500)
Communications						
Copper Wire	13,566	lbs.		@ 0.76	(10,310)	
Hot Box Detector	1	Ea.		@ 12,000	(12,000)	
						(22,310)
Buildings						(7,500)
TOTAL ESTIMATED GROSS LIQUIDATION VALUE						$(15,111,285)

DOCKET NUMBER AB-1 (SUB. NO. 113F)

Appendix C

OELWEIN, IOWA TO RANDOLPH, MINNESOTA
INCLUDING HAYFIELD TO WALTHAM, MINNESOTA

ESTIMATED LIQUIDATION VALUE—Continued

Estimated cost of labor and material recovering and dismanteling property	
Bridges	$ 258,000
Track	1,470,400
Restoring street and highway crossings	225,000
Land disposal	3,000
Signals	153,800
Communications	11,300
Buildings	3,900
TOTAL ESTIMATED COST OF LABOR AND MATERIAL RECOVERING PROPERTY	$ 2,125,400
TOTAL ESTIMATED NET LIQUIDATION VALUE	$(12,985,885)

MBM = 1,000 board measure
NT = Net ton of 2,000 pounds
Ea. = Each
TO = Turnout
Cwt. = Hundredweight
Lbs. = Pounds

INTERSTATE COMMERCE COMMISSION
CERTIFICATE AND DECISION
Docket No. AB-1 (Sub-No. 113F)
CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY—
ABANDONMENT BETWEEN OELWEIN, IA AND
RANDOLPH, MN
Decided: October 7, 1981

* * *

Concerning the ongoing subsidy offer, we have been requested to determine its amount and terms based on the avoidable cost of providing continued rail transportation, plus a reasonable return on the value of the line [see 49 U.S.C. §10905(f)(1)]. Our determination will be reached by October 24, 1981. Our decision in this matter will be binding upon the parties unless the sole

offeror in this proceeding withdraws its offer within 10 days. If the offer was to be withdrawn in a timely fashion, we would issue an abandonment certificate for the 19.2 mile segment as expeditiously as practicable. Of course, if our determination is accepted, a certificate would be withheld during the subsidy period.

Modification of Conditions. — CNW has requested that the 120-day public use condition imposed by the ALJ be modified to permit the removal of the track. We will agree to this proposed modification.

The environmental threshold assessment survey (ETAS) prepared by the Commission's Section of Energy and Environment recommended the imposition of a public use condition because the right-of-way would be suitable as a multipurpose trail for snowmobiling, biking, and hiking. Generally speak-

ing, the "public use" provisions of 49 U.S.C. § 10906 deal with the acquisition of rail properties for *other* public purposes; and, therefore, no useful purpose is served by requiring an applicant to keep rails and ties in place during the 120-day negotiating period. Consequently, since potential interest in this right-of-way involves the non-rail use of the property, the condition imposed by the ALJ will be amended to permit the removal of rail and ties. Cf. *Chicago and North Western Transp. Co.—Abandonment*, 354 I.C.C. 735, 740 (1978).

In certain instances, however, prospective purchasers of these properties may intend to acquire them for mass transportation or other public purposes necessitating maintenance of the track (for example, one other such public use would be conversion of the line into a scenic railway). Such a transaction would fall within the public use provisions of section 10906. Upon an affirmative showing that the existing rail line could be used for mass transpc..ation or similar

purposes requiring retention of the track, the public use condition would provide for maintenance of rail and ties. Because the Commission would need this information at the time it makes its determination as to whether a proposed abandonment would be required or permitted by the present or future public convenience and necessity, the information should be submitted to us within the time provided for filing comments and protests to the proceeding. Thus, information about possible mass transportation use of rail properties proposed for abandonment, requiring maintenance of rail and ties on the right-of-way, must be filed with the Commission.

* * *

INTERSTATE COMMERCE COMMISSION
DECISION
Docket No. AB-1 (Sub-No. 113F)
CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY—
ABANDONMENT BETWEEN OELWEIN, IOWA, AND
RANDOLPH, MN
REQUEST TO ESTABLISH CONDITIONS
AND COMPENSATION
Decided: October 16, 1981

* * *

Net Liquidation Value. The amount of the subsidy is based, in part, upon a reasonable return on the value of the line. This is calculated by applying a reasonable rate of return on an investment base comprised of three elements: working capital; income tax benefits; and net liquidation value. There appears to be no dispute on the working

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capital and since CNW does not pay taxes, there are no income tax benefits.

The Shippers Group maintains that the proper net liquidation value of the line segment is $1,527,320. This figure is based on a land value of $195,098 plus net salvage value of track materials of $1,332,222. CNW proposes a figure of $1,791,354 which is based on land value of $252,000 plus net salvage value of track materials of $1,539,354.

Land value — The Shippers Group states that the $195,098 value it placed on the land is based on $827 per acre and a total acreage of 235.91. CNW's land value of $252,000 is based on an average of $1,142 per acre on the 185.52 acres for the line between Dodge Center and Sargeant, and an average of $794 per acre on the 50.39 acres between Hayfield and

Waltham. The offeror argues that CNW's figure is based upon the highest and best use *for rail purposes*. CNW disputes this claim.

It appears that CNW followed the methodology provided in the regulations. It supplied data based upon the testimony of an expert witness. Since CNW took into account factors which could affect valuation, such as questionable titles, and made adjustments for size, shape, location and time necessary to effectuate sales of the property, we will accept its estimate. In contrast, offeror neither provided expert testimony nor data on comparable sales in the area.

Salvageable track material — CNW asserts that the value of the entire 22.9 mile line to be purchased (19.2 miles of main line and 3.7 miles of "other track") is $1,539,354. The Shippers Group makes two adjustments to this figure.

First, the Shippers Group asserts that the value for the entire 22.9 miles is only $1,510,291. However, the $29,063 difference between these estimates is not explained. Since the burden of proof is on the offeror, we will accept CNW's statement that the entire line is worth $1,539,354.

Second, the Shippers Group argues that a substantial portion of the 3.7 miles of "other track" is either not owned by CNW or is not required for subsidy operations. It thus subtracted the pro rated value of 2.7 miles from its original $1,510,291 estimate. CNW states, however, that of the 3.7 miles of "other track", 0.42 mile of private siding was not included and the remaining 3.37 miles is necessary

because it includes 1.05 miles of industrial sidings at Hayfield and 2.23 miles of side track through Hayfield which are used for providing service to shippers at Hayfield and Waltham, who are among the offerors.

We accept CNW's calculations because CNW has already excluded the private sidings from its calculations and has stated that the side track is necessary to serv ce some of the offerors. In conclusion, we find the net salvage value to be $1,539,354.

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* * *

Docket No. AB-1 (Sub-No. 113F)

CONCLUSIONS

Pursuant to our power to set conditions in subsidy agreements, we will require the offeror to notify both CNW and the Commission of its decision to accept the terms of this decision or withdraw its offer. This written notification must be submitted to CNW and the Commission within 10 days of the service date of this decision.

This decision will not significantly affect either energy consumption or the quality of the human environment.

It is ordered:

1. The Shippers Group must either withdraw its offer or accept the terms of this subsidy agreement within 10 days of service date of this decision. The notification of acceptance or withdrawal shall be made in writing to the Commission, CNW, and all the parties of record.

2. If the Shippers Group files a timely acceptance of the terms of the subsidy agreement it and CNW shall be bound by the terms and conditions established in this decision.

3. If the Shippers Group does not make a timely written acceptance or with drawal of its offer, the Commission shall treat the offer as if it were withdrawn.

4. If the Shippers Group withdraws its offer, the Commission shall issue a certificate authorizing the abandonment.

The abandonment certificate shall be served within 20 days after the service date of this decision.

5. This decision shall be effective on the date it is served.

By the Commission, Chairman Taylor, Vice Chairman Clapp, Commissioners Gresham and Gilliam.

AGATHA L MERGENOVICH
Secretary

(SEAL)

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INTERSTATE COMMERCE COMMISSION
CERTIFICATE AND DECISION
Docket No. AB-1 (Sub-No. 113)
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY—ABANDONMENT—BETWEEN OELWEIN, IA AND RANDOLPH, MN
Decided: November 13, 1981

* * *

It is certified that the present and future public convenience and necessity permit the abandonment by the Chicago and North Western Transportation Company of the above-described line, subject to the provisions for the protection of employees discussed in *Oregon Short Line R. Co.—Abandonment Goshen*, 360 I.C.C. 91 (1979), and subject to the further condition that C&NW shall keep intact all of the right-of-way, track, bridges, and drainage culverts on the line for a period of 120 days from August 14, 1981, to permit any State or local governmental agency or other interested persons to negotiate the acquisition for public use of all or any portion of the line.

* * *

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INTERSTATE COMMERCE COMMISSION
Docket No. AB-1 (Sub-No. 113F)
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY—ABANDONMENT—BETWEEN OELWEIN, IA AND RANDOLPH, MN
Decided: December 14, 1981

* * *

I also reject petitioners' contention that grant of the stay will not harm CNW. As noted above, CNW is operating a marginal line and is incurring a substantial opportunity cost and a grant of this stay would cause applicant to continue to incur this cost.

* * *

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-2333

BROWNSDALE COOPERATIVE ASSOCIATION; CENTURY PLASTICS, INC.; FARMERS COOPERATIVE OIL ASSOCIATION; HAYFIELD DEVELOPMENT CORPORATION; HAYFIELD LUMBER COMPANY; HUNTTING ELEVATOR COMPANY, INC.; MIDLAND COOPERATIVES, INC.; MOWER COUNTY SERVICE COMPANY; NELSON'S GAS, INC.; POWER SPAN, INC.; REESE FARM CENTER, INC.; AND SARGEANT GRAIN COMPANY,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION

Dated: December 16, 1981

Before LAY, Chief Judge, HENLEY and ARNOLD, Circuit Judges.

ORDER

On motion for leave to intervene by the Chicago and Northwestern Transportation Company and on application of petitioners for stay pending appeal of respondent's order permitting abandonment of rail service on that certain segment of railroad owned by Chicago and Northwestern Transportation Company, 19.2 miles in length located between Dodge Center and Sargeant, Minnesota and between Hayfield and Walthorn, Minnesota,

IT IS ORDERED that the motion for leave to intervene is granted; and

IT IS ORDERED that the petition is denied, but IT IS FURTHER ORDERED that pending further order of court the Chicago and Northwestern Transportation Company shall keep intact all of the right-of-way, track, bridges, and culverts on said line.

The Clerk of court shall fix a briefing schedule which will permit submission of subject case on the merits at its January, 1982, Session of Court in St. Louis.

A true copy.

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit.

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term, 1981

No. 81-2333

BROWNSDALE COOPERATIVE ASSOCIATION; CENTURY PLASTICS, INC.; FARMERS COOPERATIVE OIL ASSOCIATION; HAYFIELD DEVELOPMENT CORPORATION; HAYFIELD LUMBER COMPANY; HUNTTING ELEVATOR COMPANY, INC.; MIDLAND COOPERATIVES, INC.; MOWER COUNTY SERVICE COMPANY; NELSON'S GAS, INC.; POWER SPAN, INC.; REESE FARM CENTER, INC.; AND SARGEANT GRAIN COMPANY,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA,

Respondents,

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Intervenors/Respondents.

PETITION FOR REVIEW
OF ORDER OF INTERSTATE
COMMERCE COMMISSION

On consideration of petitioners' motion to dismiss, this petition for review of order of the Interstate Commerce Commission is ordered, and is hereby, dismissed.

Certified copies of judgment to issue forthwith.

January 14, 1982.

A True Copy:

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit